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ABSTRACT

This chapter reviews legislation and court litigation during 1986 that addressed the rights of handicapped students and employees. The most far-reaching legal activity occurred in the legislative arena, with the passage in 1986 of the Education of the Handicapped Act (EHA) mandating that services must be available for handicapped children between the ages of 3 and 21. Procedural safeguards in the EHA ensure appropriate identification, evaluation, and placement of handicapped children. Provisions of the EHA with respect to development of individualized education programs, change in placement, and administrative remedies are discussed. Subsequent sections discuss related services, an extended school year, discipline, and remedies awarded to successful litigants under the provisions of the act, as well as damages, compensatory services, and attorneys' fees. The next two sections discuss the question of state immunity to suits brought under the EHA and the enforcement of state laws that exceed EHA requirements. Remaining sections are devoted to cases of discrimination against handicapped students and employees, brought under the Rehabilitation Act of 1973, Section 504. (TE)

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Nelda H. Cambron-McCabe

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INTRODUCTION

Litigation addressing the rights of handicapped students and em-

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ployees remained at a high level in 1986. The largest number of cases involved parental requests for reimbursement of private school tuition. In the wake of *Burlington School Committee v. Department of Education*, courts attempted to assess the appropriateness of parental placements and the inappropriateness of educators' proposed public school placement.[1]

The most far-reaching legal activity occurred in the legislative arena. Congress's concern over the inability of prevailing parents to recover attorneys' fees led to the passage of a new law. Additionally, the Education of the Handicapped Act was amended to encourage states to support programs for three to five year old handicapped children.

ENTITLEMENT TO SERVICES

The Education of the Handicapped Act (EHA) mandates that services must be available for all handicapped children between the ages of three and twenty-one. School districts, however, are not required to provide programs for handicapped children below the state's minimum school age unless programs are provided for nonhandicapped children in this age group. With the passage of the Education of the Handicapped Amendments Act of 1986, Congress provided strong incentives for states to serve three to five year old children.[2] If states do not serve these children, they will lose funds appropriated for the preschool programs and will not be allowed to count three to five year old children under the basic grant. Also, in the 1986 amendments, a new state grant was authorized to enhance the development of handicapped infants and toddlers from birth to age two. Lawmakers hope that early intervention will minimize the need for services when the children reach school age. Handicapped infants and toddlers are defined as those children who need early intervention services because of developmental delays or physical or mental conditions that may result in developmental delays.

Children who were not provided a free appropriate education program prior to the 1977 effective date of the EHA have been unable to allege a denial of services under the law. The Sixth Circuit and Ninth Circuit Appellate Courts rejected two students' claims of entitlement to services in 1986. The Ninth Circuit Court noted that the Act had not been applied retroactively by courts unless administrative actions were pending when the law became effective.[3]

The designation of a child as handicapped and eligible for special

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1. 105 S. Ct. 1996 (1985).
2. P.L. 99-457.
3. Gallagher v. Pontiac School Dist., 807 F.2d 75 (6th Cir. 1986); Alexopulos v. Riles, 784 F.2d 1408 (9th Cir. 1986).

services is contingent upon the child being evaluated as having special learning needs because of a health impairment. "Health impaired" is defined in federal regulations as "having limited strength, vitality or alertness due to chronic or acute health problems . . . which adversely affect a child's educational performance."[4] A New York court concluded that, under the EHA's definition of a handicapped child, children with Acquired Immune Deficiency Syndrome (AIDS), AIDS-Related complex, or the Human T-Lymphotropic Virus, Type III (HTLV-III) antibody are not eligible for referral to a committee for evaluation.[5] The court, however, acknowledged that a child with AIDS might become eligible for special services if his condition deteriorated.

PROCEDURAL SAFEGUARDS

Extensive procedural safeguards are identified in the EHA to ensure appropriate identification, evaluation, and placement of handicapped children. Prior to the evaluation of a child, parents must be informed of their procedural rights, including a description of the process and procedures, and of the right to an impartial due process hearing to present complaints. The judiciary has been called upon frequently to interpret specific procedural rights and to assess school officials' compliance.

Development of Individualized Education Programs

A handicapped child's individualized education program (IEP) may be found inappropriate based on a school district's violation of procedural provisions of the EHA. Failure to provide written notice to parents of their right to seek a due process hearing alone was inadequate to establish that an Illinois child had been denied an appropriate education.[6] In this case, a federal district court held that the school district's behavior was consistent with the EHA's basic purpose and intent of ensuring parental participation in the development of a child's program. The parents were involved in assessing all services that their child would receive, and no placement was made without their involvement and consent.

Change in Placement

Prior to a change in a handicapped student's placement extensive procedural safeguards must be provided. Courts in 1986 addressed what alterations in a program constitute a change, and when parents are

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4. District 27 Community School Bd. v. Board of Educ. of City of New York, 502 N.Y.S.2d 325, 339 (Sup. Ct. 1986), *citing* 34 C.F.R. § 300.5(b)(7).

5. *Id.*

6. Max M. v. Illinois State Bd. of Educ., 629 F. Supp. 1504 (N.D. Ill. 1986).

justified in unilaterally changing their child's placement.

Program Modification. Before a change in a substantive aspect of a handicapped student's program, written notice must be given to the parents. All changes, however, may not constitute a "change in educational placement" necessitating notice. In a Massachusetts case, parents challenged the lack of notice of a change in their child's after-school program.[7] The handicapped child was enrolled in two different private extended day-care programs for nonhandicapped students in the same school—two afternoons a week in one program and three afternoons in another. A change was necessitated in the child's program when one of the programs refused to continue his enrollment because of an age limitation. The parents requested full time enrollment in the other program, but the school district was able only to increase the program to three afternoons and then provide an individualized program in the same school for two afternoons. The parents challenged the lack of written notice prior to the change, and the state review agency held that notice was required under the EHA regulations. The Massachusetts Federal District Court disagreed, finding that the modification in the program did not constitute a change in the child's educational placement. To constitute a change, the court held that a modification must have a significant affect on the learning experiences offered the child. The changes in this instance were found to be superficial—same location, personnel, and amount of time, and the provision of similar learning opportunities in a mainstream program.

The Ninth Circuit Court of Appeals, however, found that the reduction of a student's full-day program schedule to a part-day schedule following several incidents of misbehavior without an IEP conference violated the student's rights under the EHA.[8] While the guardians were aware that the student's program had been reduced because of misbehavior, they were not notified of their right to object or to seek review of the decision.

Exclusion from School. Exclusion of a handicapped child from school is a change in educational placement and must be preceded by written notice. The Fifth Circuit Court of Appeals held that a school district violated a child's EHA notice rights by unilaterally excluding him from school after a court-ordered two-month stay in a state hospital for evaluation and treatment.[9] The school officials' exclusion was based

7. Brookline School Comm. v. Golden, 628 F. Supp. 113 (D. Mass. 1986).
8. Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986).
9. Jackson v. Franklin County School Bd., 806 F.2d 623 (5th Cir. 1986).

on fear that the student's return to school for the final month of classes might endanger his safety or the safety of other students. The officials, however, did not convene the student's program committee at that time or at the beginning of the next school year to determine his placement. After the parent filed a complaint, a conference was held, but the parent rejected the school district's proposed residential placement and a two-year legal battle ensued.[10] After concluding that the school officials' failure to hold an IEP conference was a *per se* violation of the EHA, the appellate court remanded the case for a determination of the student's loss: Did the loss include the entire appeal period or simply the spring and fall denial (parent's obstinance may have been responsible for the two-year loss)? What remedy would be appropriate for the loss (a monetary award or remedial services)?

Placement During Due Process Proceedings. Section 1415-(e)(3) of the EHA, often referred to as the "stay put" or "status quo" provision, provides that "[d]uring the pendency of any proceedings conducted . . . unless the state or local educational agency and the parents or guardian otherwise agree, the child shall remain in the current educational placement of such child . . . ." While the purpose of this provision is to provide stability and continuity in a child's educational program, until 1985 it had interferred with a parent's ability to alter an inappropriate placement during a lengthy review process; courts had generally held that unilateral placement was a bar to reimbursement of private school tuition. The United States Supreme Court in 1985 in *Burlington School Committee v. Department of Education* ruled that tuition costs could be recovered by parents if it were determined that the private placement was appropriate and the public school placement was inappropriate.[11]

Several courts applied the *Burlington* decision in 1986. In two cases, courts held that parents' were justified in the unilateral placement of their children in private facilities. The Third Circuit Court of Appeals affirmed a New Jersey federal district court decision holding that a school system's proposed day school program was inadequate for a neurologically impaired and trainably mentally retarded child.[12] Similarly, a New York federal district court found the mainstreaming of a

10. While this case was pending, the student requested a preliminary injunction to permit him to return to his "current placement" in the school district. The Fifth Circuit Appellate Court denied the request, holding that a school system can exclude a student during an IEP appeal if the student poses a danger in the school environment. Jackson v. Franklin County School Bd., 765 F.2d 535 (5th Cir. 1985). *See* The Yearbook of School Law 1986 at 125, 133.

11. *See* The Yearbook of School Law 1986 at 128-29.

12. Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986).

neurologically impaired middle school student to be inadequate and inappropriate.[13] The parents in both cases were awarded tuition reimbursement for private placement expenses. In a third case, a Virginia federal district court confirmed that unilateral placement by parents was not an automatic bar to tuition reimbursement.[14] The case was remanded to the administrative level to consider the appropriateness of the public and private placements.

A New York federal district court again interpreted "current educational placement" under the 1982 *Jose P.* order which authorized parents to enroll their handicapped children in private schools at a school district's expense if a placement was not made within sixty days of the request for review.[15] Following such a private placement, if a parent finds the educational placement proposed by a school district unacceptable, the court held that the child may remain in the current educational placement, which is the private placement, until all impartial review proceedings are completed.

While the Fifth Circuit Appellate Court in 1985 held that school personnel can remove a student from school without parental consent during an IEP appeal if the student poses a danger in the educational setting,[16] the Ninth Circuit Court of Appeals' disagreed sharply with that position.[17] The Ninth Circuit Appellate Court found an indefinite removal of a student from school pending the resolution of a lengthy appeal process to be a violation of the "stay-put" provision. The court, however, did not find that a brief suspension authorized by state law conflicted with the EHA provision.

Administrative Remedies

Prior to initiating a judicial challenge to a school district's actions regarding educational placement and services under the EHA, a parent must exhaust available administrative remedies. A New York parent was denied tuition reimbursement for a unilateral private placement of his handicapped child because he did not pursue the required administrative proceedings.[18] After a committee on the handicapped had been unable to find a placement for his child in a state-approved facility, he placed the child in a private school and then initiated judicial proceed-

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13. Eugene B. Jr. v. Great Neck Union Free School Dist., 635 F. Supp. 753 (E.D.N.Y. 1986).
14. Linkous v. Davis, 633 F. Supp. 1109 (W.D. Va. 1986).
15. Board of Educ. v. Ambach, 628 F. Supp. 972 (E.D.N.Y. 1986).
16. *See* Jackson v. Franklin County School Bd., 765 F.2d 535 (5th Cir. 1985).
17. Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986). *See also* text with note 57, *infra*.
18. Semel v. Ambach, 505 N.Y.S.2d 466 (App. Div. 1986).

ings to compel the commissioner of education to pay the expenses. In the absence of administrative review, a New York appellate court dismissed the legal proceedings.

Litigation continued this year in another New York case. In 1985 a father, who had not exhausted state administrative procedures because he concurred with the local committee's decision, was denied an injunction to compel the state to place his daughter in a private facility that had been recommended by the local committee but had been removed from the state approved list.[19] After the 1985 decision, the father sought a review of the committee's decision, which was upheld by a hearing officer but was rejected in a review initiated by the commissioner of education. The federal district court in 1986 held that under federal requirements the administrative remedies are exhausted after the hearing officer's decision unless an aggrieved party appeals the decision.[20] Accordingly, the hearing officer's decision was final, and the commissioner did not have the authority to review the decision as to whether the child was handicapped and the type of educational or related services required. The court, however, concluded that a trial was necessary to consider the financial responsibility of the state regarding educational and medical needs of the child, the approval status of the private facility, the facility's suitability to meet the child's needs, and the possibility of alternative placements.

While parents must generally exhaust administrative remedies, courts have recognized exceptions if it appears that administrative relief would be unproductive. Three cases in 1986 reinforced this principle. A Florida federal district court held that administrative exhaustion was not required in a case involving broad scale racial misclassification claims; the administrative remedies were found to be inadequate to resolve the claim.[21] Similarly, the Ninth Circuit Court of Appeals concurred that parents are not required to exhaust administrative proceedings if they would be futile or inadequate.[22] Furthermore, the court held that the guardians in this case were not required to allege in the legal complaint that administrative review would be inadequate or futile because the school district did not inform them of the available safeguards and channels for review. A New York federal district court held that prior administrative review is not required when the claim itself involves the adequacy of those review procedures.[23]

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19. *See* The Yearbook of School Law 1986 at 125.
20. Antkowiak v. Ambach, 638 F. Supp. 1564 (W.D.N.Y. 1986).
21. S-1 v. Turlington, 646 F. Supp. 1179 (S.D. Fla. 1986).
22. Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986).
23. Louis M. v. Ambach, 113 F.R.D. 133 (N.D.N.Y. 1986). *See* The Yearbook of School Law 1986 at 126.

Several courts found that specific elements of the administrative review procedures were flawed. A Mississippi federal district court held that a state review team composed of officers and employees of local school districts did not constitute an "impartial panel" as required by the EHA.[24] A federal district court found that the Pennsylvania administrative review procedures violated several aspects of the EHA.[25] The court held that, for state-level review purposes, the secretary of education was not an impartial hearing officer because she was an employee of the state department of education. The court also held that a state-level decision cannot be remanded to the local level to seek additional evidence. A Florida appellate court ruled that the role of a hearing officer is limited to determining whether a school district's proposed placement is appropriate; a hearing officer cannot order a particular placement.[26] While the court found that the hearing officer in this case exceeded his authority by ordering a residential placement, it noted that he could have remanded the issue to the school district with his recommendation. A Michigan appellate court held that a state review official should have permitted a school district to submit a brief or to present oral argument since the parents submitted a statement.[27]

PLACEMENT

After agreement is reached on a child's individual education program, an appropriate placement must be made at public expense. Alternative placements may include a regular classroom with support services, a regular classroom supplemented with resource room instruction, self-contained special classes, home instruction, and hospital or institutional instruction. Within this continuum of placements, a child must be educated in the least restrictive environment (LRE), which may be in a public or private school system depending on the needs of the child and the availability of an appropriate program.

Least Restrictive Environment

The EHA ensures that "to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handi-

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24. Kotowicz v. Mississippi State Bd. of Educ., 630 F. Supp. 925 (S.D. Miss. 1986). The court also held that a review team must make specific written findings of fact and conclusions of law to support its decision.
25. Muth v. Smith, 646 F. Supp. 280 (E.D. Pa. 1986).
26. Hendry County School Bd. v. Kujawski, 498 So. 2d 586 (Fla. Dist. Ct. App. 1986).
27. Nelson v. Southfield Pub. Schools, 384 N.W.2d 423 (Mich. Ct. App. 1986).

capped."[28] This least restrictive environment or mainstreaming provision was the basis for an Eighth Circuit Appellate Court decision in which the parents sought a preschool placement in a private program that served both handicapped and nonhandicapped students in an integrated setting.[29] The parents had rejected the area education agency's recommendation of placement in a regular elementary school special class that served only handicapped students. While the appellate court emphasized the importance of mainstreaming, it stated that the EHA "creates a clear preference for *public* educational placement when that placement is not inconsistent with the mainstreaming provisions of the [A]ct."[30] The court did not find an inconsistency in placing the preschooler in an all-handicapped class as it did not view the EHA as requiring that handicapped children must be educated in the same classroom with nonhandicapped students. The court stated that the child "at the very least, will be educated *in the same school* with nonhandicapped children."[31] Furthermore, the court noted that Iowa does not provide integrated preschool programs, and the EHA does not require states to establish new levels of services to meet the mainstreaming mandate. The United States Supreme Court declined to review the case.

The Third Circuit Court of Appeals briefly addressed mainstreaming in a residential placement challenge.[32] The school district argued that a special day program must be preferred over a residential placement under the least restrictive environment requirement.[33] In rejecting this argument, the court defined the least restrictive environment as an environment "in which educational progress rather than educational regression can take place."[34] Accordingly, the court noted that a residential placement may be the least restrictive depending on a student's disability. Similarly, a New York federal district court held that the least restrictive environment must be determined by assessing an individual child's abilities and needs.[35] For a severely multiple handicapped student, the court found that a special private facility offered the least restrictive environment.

Private Facilities

In 1986, as in previous years, one of the most litigated issues under

28. 20 U.S.C. § 1412(5).
29. Mark A. v. Grant Wood Area Educ. Agency, 795 F.2d 52 (8th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3644 (1987).
30. *Id.* at 54.
31. *Id.*
32. Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986).
33. *See* text with note 38, *infra*.
34. *Id.*, 808 F.2d at 992.
35. Taylor v. Board of Educ., 649 F. Supp. 1253 (N.D.N.Y. 1986).

the EHA was who must pay the cost of educating a handicapped child in a private facility. The federal law clearly requires public school districts to place handicapped children in private facilities if an appropriate public placement is not available.[36] If parents select a private placement when an appropriate public one is available, they must bear the cost. However, under the Supreme Court's 1985 decision in *Burlington School Committee v. Department of Education*, parents who unilaterally place their children in a private facility pending resolution of a placement may be awarded tuition reimbursement if it is determined that the private placement is appropriate and the public school placement is inappropriate.[37]

Relying on *Burlington*, the Third Circuit Court of Appeals and a New York federal district court ordered reimbursement of tuition costs for appropriate private placements when the evidence showed that the public school placements were inadequate.[38] The New York federal district court in a second case, however, found that a school district's proposed program that enabled a handicapped child to receive educational benefits was appropriate.[39] According to the court, the critical point in assessing appropriateness is not whether one program is better than the other, but whether the child benefits educationally from the public school placement. An Illinois appellate court denied tuition reimbursement to parents for a private placement in a nonapproved institution.[40] The court held that while a private placement selected by parents must be appropriate it also must be one that a school district has the authority to provide. In two cases, courts rejected school officials' motions to dismiss, determining that parents had alleged violations of the EHA that might justify tuition reimbursement depending on the appropriateness of the programs.[41]

Parents in a Hawaii case sought a preliminary injunction to require the state to place their handicapped child in a private residential facility pending the outcome of the judicial review process.[42] Based upon the inadequacy of the department of education's program, the lack of

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36. An appropriate education is one that is designed to meet the unique needs of each child and includes special education and related services; it does not require sufficient services to maximize each child's potential. *See* Max M. v. Illinois State Bd. of Educ., 629 F. Supp. 1504 (N.D. Ill. 1986); Hendry County School Bd. v. Kujawski, 498 So. 2d 566 (Fla. Dist. Ct. App. 1986).

37. 105 S. Ct. 1996 (1985). *See* Yearbook of School Law 1986 at 128-29.

38. Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986); Eugene B. Jr. v. Great Neck Union Free School Dist., 635 F. Supp. 753 (E.D.N.Y. 1986).

39. Manuel R. v. Ambach, 635 F. Supp. 791 (E.D.N.Y. 1986).

40. Taglianetti v. Cronin, 493 N.E.2d 29 (Ill. App. Ct. 1986).

41. Gerasimou v. Ambach, 636 F. Supp. 1504 (E.D.N.Y. 1986); Linkous v. Davis, 633 F. Supp. 1109 (W.D. Va. 1986).

42. Department of Educ. v. Mr. and Mrs. S., 632 F. Supp. 1268 (D. Hawaii 1986).

financial ability of the guardians, and potential injury to the student, the Hawaii federal district court ordered the state to fund an appropriate residential placement.

Courts have not required educational agencies to place handicapped students in out-of-state private schools when appropriate placements exist within the state. A Pennsylvania commonwealth court denied parents' request for an out-of-state placement, finding that an appropriate in-state private program could be provided.[43] Similarly, a Virginia federal district court rejected parents' request to place their child in an unapproved out-of-state residential school; the child had been accepted for admission by an approved in-state private school.[44]

Litigation again highlighted the difficulty of separating educational, medical, and social problems in determining the appropriateness of residential placements. A Virginia appellate court noted that an inquiry must determine whether a residential placement is "a necessary ingredient for learning."[45] Although the court observed that the emotional disability of the handicapped child in this case could be more thoroughly addressed in a structured residential placement, the court concluded that the child's significant educational progress in special education classes demonstrated that the school district had met its obligation under the EHA. In a New York case, a federal district court held that in a trial on the merits of a residential placement the court must determine whether the placement is necessitated by educational, emotional, or social needs.[46]

RELATED SERVICES

Under the EHA, an appropriate education includes related services "required to assist a handicapped child to benefit from special education."[47] Controversies in 1986 involved transportation, in-school nursing care, psychotherapy, and extracurricular activities.

In upholding the transportation of a child one mile outside a school district, the Fifth Circuit Court of Appeals reasoned that transportation "is not arbitrarily limited by the geographic boundaries of the school district so long as it is required for the special circumstances of the handicapped child and is reasonable when all of the facts are considered."[48] In this instance, the only available custodian to care for the

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43. Murphy v. Commonwealth, Dep't of Educ., 504 A.2d 382 (Pa. Commw. Ct. 1986).

44. Schimmel v. Spillane, 630 F. Supp. 159 (E.D. Va. 1986).

45. Martin v. School Bd., 348 S.E.2d 857, 864 (Va. Ct. App. 1986), *quoting* Kruell v. New Castel County School Dist., 642 F.2d 687 (3d Cir. 1981).

46. Antkowiak v. Ambach, 638 F. Supp. 1564 (W.D.N.Y. 1986).

47. 20 U.S.C. § 1401(17).

48. Alamo Heights Indep. School Dist. v. State Bd. of Educ., 790 F.2d 1153, 1160 (5th

child while his mother worked did not live within the school district. The court, finding the transportation request reasonable, noted that the district did not argue that the transportation was a burden, posed substantial additional expense, created an inconvenience for the school district or other students, or disrupted efficiency of bus routes.

A New York federal district court addressed whether a school district was required to provide constant nursing care to enable a severely physically handicapped child to attend public school.[49] The court found that the nature of the child's disability necessitated extensive, specialized care that must be administered by a licensed practical nurse or registered nurse; constant monitoring was needed to protect the child's life. While the court held that the care requested could not be classified as a "medical service" that must be performed by a physician, neither could it be considered merely a school health service. The court concluded that it was more closely related to medical services than school health services, noting that not all health services performed by someone other than a physician are required. Although the court recognized that the child would not be able to attend school without the care requested, the court did not find that it was necessary for the board to provide the services.

An Illinois federal district court rendered its fifth decision in a case involving psychotherapy.[50] In light of the United States Supreme Court's decision in *Burlington*,[51] the parents requested reconsideration of the court's judgment denying them reimbursement for unilaterally secured psychotherapy.[52] While the school district argued that the ruling should be applied on a prospective-only basis, retroactive application was found to be appropriate because it furthered the purpose and effect of the *Burlington* rule. The court concluded that the failure of the school district to provide psychotherapy services denied the handicapped child a free appropriate public education and entitled the parents to reimbursement. The court did not modify its earlier ruling restricting reimbursement of physicians' fees to the cost that would be charged by qualified health care professionals. However, since the school district had agreed to pay for the psychotherapy and had not offered proof that the services could be provided for less, the court ordered full reimbursement of the physician-provided care.

Cir. 1986).

49. Detsel v. Board of Educ., 637 F. Supp. 1022 (N.D.N.Y. 1986).

50. Max M. v. Illinois State Bd. of Educ., 629 F. Supp. 1504 (N.D. Ill. 1986).

51. Burlington School Comm. v. Department of Educ., 105 S. Ct. 1996 (1985). Under *Burlington*, prior expenditures can be recovered if it is later determined that unilateral placement is appropriate and the school district's program is inappropriate.

52. See The Yearbook of School Law 1986 at 128-29.

Ohio parents were unsuccessful in claiming that extracurricular activities were necessary to assist their son to "benefit from special education."[53] The Sixth Circuit Court of Appeals concluded that the EHA does not require a district to provide handicapped students every service that is available to nonhandicapped students; only services from which the student would receive educational benefit must be provided. Since it was determined by the hearing officer that the student was unable to benefit significantly from the activities, the court held that there was no obligation to provide the extracurricular program.

EXTENDED SCHOOL YEAR

It has been clearly established that handicapped children must be provided educational services beyond the regular school year if the lack of services will jeopardize the educational benefits acquired during the year. The issue litigated by the Fifth Circuit Court of Appeals was whether a structured summer program was required for a specific child.[54] The mother of a multiple handicapped child requested extended-year services to lessen the significant regression her son experienced in basic skills and knowledge during the summer. While the school officials maintained that the child did not show significant regression, the appellate court agreed with the district court, hearing officer, and state commissioner of education that the evidence indicated that he would suffer "at least substantial regression," and thereby be entitled to continuous services.

The second case in this area did not raise the question of entitlement to summer programming but rather the issue of who must pay for these services. The Eighth Circuit Appellate Court again ruled in the continuing litigation involving the state of Missouri and the Special School District of St. Louis County.[55] The parents and the Special School District filed this action seeking specific funding from the state for summer programs. The request involved, *inter alia*, exceptional pupil aid for summer programs proportionate to the aid provided during the regular school year, aid for contractual services on a proportionate basis,

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53. Rettig v. Kent City School Dist., 788 F.2d 328 (6th Cir. 1986), *cert. denied*, 106 S. Ct. 3297 (1986).

54. Alamo Heights Indep. School Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986). The Fifth Circuit Appellate Court had held earlier that year-round programming is required if a child will experience substantial regression during the summer months without services, Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983).

55. Yaris v. Special School Dist., 558 F. Supp. 545 (E.D. Mo. 1983), *aff'd*, 728 F.2d 1055 (8th Cir. 1984), *on remand*, 604 F. Supp. 914 (E.D. Mo. 1985), *aff'd*, 780 F.2d 724 (8th Cir. 1986), *cert. denied*, 106 S. Ct. 2896 (1986).

and an order that the state distribute P.L. 94-142 discretionary funds directly to school districts rather than support state-operated summer programs with these funds. The state defendants maintained that exceptional pupil aid is allocated on a "lump sum" basis for the education of handicapped children and is not limited to 180 days of instruction; summer programming requires a district to spread the aid over twelve months rather than nine months. The court refused to interfere with the state's aid scheme, viewing the plaintiffs' efforts as "an attempt to 'bootstrap' from this court that which they cannot obtain from the Missouri Legislature."[56] The court ordered the state to support summer contractual services, but denied the plaintiffs' request to alter federal requirements regarding P.L. 94-142 discretionary funds. In declining to regulate the state's educational funding decisions, the court noted that there was no evidence indicating that any handicapped child who needed summer services had been denied services. The United States Supreme Court denied review of the case.

DISCIPLINE

The Ninth Circuit Court of Appeals concurred with several other federal appellate courts that the expulsion of handicapped students is a change in placement triggering the procedural safeguards of the EHA.[57] The Ninth Circuit case involved two California students who were subjected to extended suspensions pending the outcome of expulsion proceedings. In a lengthy opinion, the Ninth Circuit Court of Appeals held that a handicapped student cannot be expelled if the student's misbehavior is a manifestation of his handicapping condition. Furthermore, the court held that an indefinite suspension pending resolution of the expulsion process violates the "stay put" provision of the EHA and cannot be imposed. The court stated that prior to expelling a handicapped student EHA procedures for changing a child's placement must be followed rather than state law regarding expulsion of students. If an IEP team determines that there is *no* relationship between the student's conduct and handicap, the court concluded that the student can be expelled and also suspended during the expulsion proceedings. State officials successfully petitioned the United States Supreme Court to review the appellate court's interpretation of the "stay put" provision. The state has argued that educators must have the authority to remove handicapped students exhibiting disruptive and violent behavior.

Furthermore, the Ninth Circuit Appellate Court noted that handicapped students are not immune from disciplinary measures that do not

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56. *Id.*, 780 F.2d at 725.
57. Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 1284 (1987).

deprive them of an appropriate education or involve a change in placement. The two- and five-day suspensions permitted under California law were found clearly to be such a permissible measure. While a new provision in the California Education Code permitting twenty-day suspensions (and in special cases thirty days) was not an issue in the case, the court also did not view that deprivation as substantial enough to constitute a violation of the EHA.

In addition to the above findings, the court held that a state has a duty to develop a policy on the discipline of handicapped students that ensures students' EHA rights. While the state of California had enacted legislation after this case was filed, the court found that several sections of the new law violated the EHA.

REMEDIES

Damages

A New York federal district court's decision agreed with the prevalent view that monetary damages are unavailable under the EHA unless exceptional circumstances exist showing bad faith and egregious failure to comply with the procedural requirements of the Act.[58] However, since the parents had alleged violations that might support a damage award, the court denied the state commissioner's motion to dismiss the case.

Compensatory Services

The Eighth Circuit Court of Appeals[59] found an award of compensatory educational services to be analogous to the granting of retroactive tuition reimbursement upheld by the United States Supreme Court in *Burlington*.[60] In both instances, educational agencies are simply required to pay expenses that should have been incurred earlier. Although the state argued in the Eighth Circuit case that compensatory services were not "retroactive reimbursement," the court ruled that a child should not be denied the services because the parent could not financially provide the services initially. Accordingly, the case was remanded to determine if the state had deprived the child of a free appropriate education.

An Illinois federal district court denied a claim for compensatory remedial education when evidence showed that a child had received an appropriate education.[61]

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58. Gerasimou v. Ambach, 636 F. Supp. 1504 (E.D.N.Y. 1986).
59. Miener v. Missouri, 800 F.2d 749 (8th Cir. 1986).
60. Burlington School Comm. v. Department of Educ., 105 S. Ct. 1996 (1985).
61. Max M. v. Illinois State Bd. of Educ., 629 F. Supp. 1504 (N.D. Ill. 1986).

Attorneys' Fees

Although the EHA did not provide courts the discretion to award attorneys' fees, the Act was amended in 1986 to permit such an award to parents who prevail in any action or proceedings under the Act.[62] The amendment was prompted by the Supreme Court's 1984 decision in *Smith v. Robinson* interpreting the EHA as the exclusive means for enforcing handicapped students' rights to a free appropriate education.[63] In *Smith*, the Court concluded that where rights were guaranteed by the EHA, parents could not allege violations under either section 1983 of the Civil Rights Act of 1871 or section 504 of the Rehabilitation Act to secure attorneys' fees. Because Congress feared that the inability of parents to recover costly attorneys' fees might impede enforcement of the EHA, legislation was introduced almost immediately following *Smith* to change the law. After substantial debate, the EHA was amended two years later.

Briefly, the amendment provides that a court may award a parent or guardian reasonable attorneys' fees. Fees are recoverable for any action filed after July 3, 1984 or actions pending at that time, but are limited in several respects: (1) fees must be based on comparable rates in the community for similar legal services, with no bonus or multiplier permitted in calculating the amount;[64] (2) fees may not be awarded for legal services performed after a parent's or guardian's rejection of an education agency's written offer of settlement (made within specified timeframes) if the final relief gained through the due process hearing or court action is not more favorable than the settlement offer; and (3) where the education agency has not prolonged the controversy or violated procedural safeguards of EHA, fees may be reduced if the parent or guardian "unreasonably protracted" the controversy, or the time spent on the action and services was excessive compared to similar proceedings.

Another significant element of the 1986 amendment is the stipulation that the EHA is not to be interpreted as restricting rights or remedies available under the Federal Constitution, section 504 of the Rehabilitation Act, or other civil rights statutes. However, if an action is initiated under other laws seeking relief that also is available under the EHA,

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62. P.L. 99-372, Handicapped Children's Protection Act of 1986. The law provides that a *court* may award reasonable attorneys' fees. A recent decision of the Supreme Court indicates that parents prevailing in administrative proceedings may have difficulty in recovering fees in legal actions initiated solely to recover fees. *See* North Carolina Dep't of Transp. v. Crest Street Community Council, 107 S. Ct. 336 (1986).

63. 468 U.S. 992 (1984).

64. A bonus or multiplier is sometimes used in unusually difficult cases or cases that involve a significant public issue.

procedural requirements of the EHA must be exhausted.

Prior to the passage of the amendment in August 1986, several courts relying on *Smith* rejected fee awards.[65] Following enactment, other courts simply awarded attorneys' fees to prevailing parents in cases that were pending.[66] The Fifth Circuit Court of Appeals remanded a case for further proceedings related to the state defendants' claims of eleventh amendment immunity and sovereign immunity and the handicapped student's request for attorneys' fees for administrative proceedings prior to litigation.[67] Only one case offered an interpretation of any provisions within the new law. A New York school district argued that parents in a class action suit who did not exhaust administrative remedies must be denied attorneys' fees.[68] Since the case involved alleged system-wide violations of the EHA procedures, the federal district court ruled that exhaustion of administrative remedies would have been futile and, therefore, unnecessary. Under the law, attorneys' fees may be awarded to parents who prevail in a legal action. According to the New York court, the parents may prevail through litigation or a settlement.

STATUTE OF LIMITATIONS

Since the EHA does not contain a statute of limitations for filing suits, courts determine which state law provisions are analogous to the federal law. A number of statutes may apply, resulting in courts assessing which ones are most consistent with the EHA policies. New York[69] and West Virginia[70] federal district courts found four months and 120 days, respectively, to be adequate, while a Virginia federal district court held that the most appropriate limitation would be one year.[71] The Sixth Circuit Court of Appeals in a Tennessee case, however, concluded that a statutory limitation of one year was inadequate to encourage parental involvement in educational decision making and held that a three-year limitation was the most consistent with the goals of the EHA.[72]

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65. Alamo Heights Indep. School Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986); Yaris v. Special School Dist., 780 F.2d 724 (8th Cir. 1986), *cert. denied*, 106 S. Ct. 2896 (1986).

66. Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986); Taylor v. Board of Educ., 649 F. Supp. 1253 (N.D.N.Y. 1986).

67. Fontenot v. Louisiana Bd. of Elementary and Secondary Educ., 805 F.2d 1222 (5th Cir. 1986).

68. J.G. v. Board of Educ., 648 F. Supp. 1452 (W.D.N.Y. 1986).

69. Gerasimou v. Ambach, 636 F. Supp. 1504 (E.D.N.Y. 1986).

70. Thomas v. Staats, 633 F. Supp. 797 (S.D. W. Va. 1986).

71. Kirchgessner v. Davis, 632 F. Supp. 616 (W.D. Va. 1986).

72. Janzen v. Knox County Bd. of Educ., 790 F.2d 484 (6th Cir. 1986).

STATE IMMUNITY

Extensive litigation involving the eleventh amendment and principles of sovereign immunity has established that states cannot be sued in federal courts unless they consent through waiver of immunity or Congress expressly abrogates immunity.[73] Following the Supreme Court's 1985 decision holding that the Rehabilitation Act of 1973 did not abolish states' immunity to suit, questions have arisen as to whether states also are immune to suits under the EHA.[74] Both the Seventh Circuit and Ninth Circuit Appellate Courts concluded, in the absence of "unmistakable language" in the law waiving immunity, that Congress did not abrogate states' eleventh amendment immunity in enacting the EHA.[75] The Ninth Circuit Court of Appeals noted that while the EHA imposed specific duties on states, "it nowhere explicitly conditions their right to receive funds on their willingness to waive their sovereign immunity."[76] The New Hampshire Federal District Court, however, followed the precedent established by the First Circuit Court of Appeals in 1985, holding that Congress did effectively abrogate states' immunity for claims under the EHA.[77] The First Circuit Appellate Court held that the EHA was enacted to assure handicapped children equal protection of the law, which is a recognized limitation on eleventh amendment immunity.[78]

STATE LAWS

Again, as in 1985, the Third Circuit Court of Appeals held that state standards for handicapped students exceeding the EHA requirements may be enforced in federal courts.[79] In upholding a residential placement as appropriate for a severely disabled child, the appellate court noted that even if the placement would not have been deemed necessary under the EHA it would have been required by the New Jersey standard that required services "according to how the student can best achieve

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73. *See* The Yearbook of School Law 1986 at 138-41.

74. Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142 (1985).

75. Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986); Gary v. New Trier High School Dist. No. 203, 796 F.2d 940 (7th Cir. 1986).

76. Doe, 793 F.2d at 1494.

77. John H. v. Brunelle, 631 F. Supp. 208 (D.N.H. 1986). *See* David D. v. Dartmouth School Comm., 775 F.2d 411 (1st Cir. 1985), *cert. denied*, 106 S. Ct. 1790 (1986); The Yearbook of School Law 1986 at 140-41.

78. A Florida federal district court also adhered to the First Circuit ruling. S-1 v. Turlington, 646 F. Supp. 1179 (S.D. Fla. 1986). Without any reference to the EHA or congressional intention, a New York federal district court simply concluded that the eleventh amendment bars suits against states. Gerasimou v. Ambach, 636 F. Supp. 1504 (E.D.N.Y. 1986).

79. Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986).

success in learning."[80] Although the state law had been amended since the case was initiated, the court stated that there was no indication that the more stringent standard had been diminished. The New Hampshire Federal District Court also confirmed that an integral part of determining an appropriate education under the EHA is an examination of state statutes.[81]

In a state court case, an appellate court interpreted a Michigan law mandating that special education programs maximize the potential of handicapped students.[82] While the court found that this standard had been incorporated into the EHA, it was not seen as imposing unlimited services. The court stated that "[w]hen two competing educational programs which meet the child's requirements are evaluated, the needs of the handicapped child should be balanced with the needs of the state to allocate scarce funds among as many handicapped children as possible."[83] If two programs would enable the child to reach maximum potential, the court noted that it would be reasonable to select the less costly program.

A range of issues was litigated under specific aspects of state handicapped laws or related laws. A Colorado appellate court held that a student's school district of residence was financially responsible for providing special education services, not the department of social services that placed the child with foster parents.[84] In a New Hampshire case, the state high court ruled that a district court has the authority in delinquency proceedings to order a school district to review a handicapped child's educational program but does not have the authority to review the substance of the program and declare it inadequate.[85] Under Pennsylvania law, a commonwealth court concluded that a private state-approved school must serve a handicapped child until the school district or the parent determines that the placement is no longer appropriate.[86] The Connecticut Supreme Court emphasized that there must be "strict adherence" to the state administrative procedures act; however, plaintiffs did not violate the act by failing to name the hearing board in its suit against the state because the board is not an "agency" within the meaning of the law.[87] The application of a New York resi-

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80. *Id.* at 991.
81. John H. v. Brunelle, 631 F. Supp. 208 (D.N.H. 1986).
82. Nelson v. Southfield Pub. Schools, 384 N.W.2d 423 (Mich. Ct. App. 1986).
83. *Id.* at 425.
84. A.C.B. v. Denver Dep't of Social Servs., 725 P.2d 94 (Colo. Ct. App. 1986).
85. *In re* Todd P., 509 A.2d 140 (N.H. 1986).
86. Woods Schools v. Commonwealth, Dep't of Educ., 514 A.2d 686 (Pa. Commw. Ct. 1986).
87. Fairfield Bd. of Educ. v. State Dep't of Educ., 503 A.2d 1147 (Conn. 1986).

dency statute was found to violate the equal protection rights of a handicapped student.[88] Although the student had resided in a "family home" in the school district since birth, the district declined to pay for educational services when the student's parents moved out of the state. A Michigan appellate court did not find that a state high school athletic association violated a hearing-impaired student's due process rights by failing to provide an exception to its age rule for participation.[89]

DISCRIMINATION UNDER THE REHABILITATION ACT, SECTION 504

The Rehabilitation Act of 1973, section 504, provides that "[n]o otherwise qualified handicapped individual in the United States . . . shall, solely by reasons of his handicap, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . . ." Section 504 is broader than the EHA and applies to educational and noneducational agencies receiving federal assistance. It prohibits recipients of federal funds from discriminating against handicapped individuals in educational programs and employment.

Students

As noted, the Supreme Court in *Smith* severely limited the application of section 504 to handicapped students.[90] Until the Handicapped Children's Protection Act authorizing the award of attorneys' fees was passed in 1986, courts continued to dismiss most claims raised under section 504.[91] Following enactment of the attorneys' fees law which contained a provision eliminating the *Smith* restriction on the use of section 504, courts have disagreed as to whether section 504 should be applied retroactively. The Third Circuit Court of Appeals relied on the long standing principle that appellate courts are required to apply enacted laws to pending cases.[92] The court specifically rejected the argument that silence with respect to retroactive application of section 504 indicated that Congress intended only prospective application. Distinguishing the retroactive provision of the attorneys' fees section from

88. Catlin v. Ambach, 644 F. Supp. 161 (N.D.N.Y. 1986).
89. Nichols v. Farmington Pub. Schools, 389 N.W.2d 480 (Mich. Ct. App. 1986).
90. Smith v. Robinson, 468 U.S. 992 (1984). *See* text with note 63, *supra*.
91. *See* Miener v. Missouri, 800 F.2d 749 (8th Cir. 1986); Kirchgessner v. Davis, 632 F. Supp. 616 (W.D. Va. 1986). *But see* S-1 v. Turlington, 646 F. Supp. 1179 (S.D. Fla. 1986).
92. Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986).

the silence regarding section 504, the court noted that retroactive designation is necessary if a new law is to be applied to pending cases, whereas clarification of a misinterpretation of congressional intention with respect to an existing law does not require such an indication. In contrast to this position, a New York federal district court refused to recognize retroactive effect of section 504, noting that Congress did not specifically provide for retroactive application.[93]

As noted above, section 504 is applicable to institutions only if they receive federal financial assistance. However, the question of whether program-specific funding is required to file a section 504 claim continues to be debated. The Sixth Circuit Court of Appeals, relying on the Supreme Court's interpretation of title IX, held that institution-wide financial assistance is inadequate to initiate a case; an individual must claim involvement or exclusion in a program that receives assistance.[94] The handicapped student in this case was denied relief because he was never involved in, nor sought to be involved in, a specific program receiving federal assistance.

Widespread concern regarding AIDS, AIDS-Related Complex, and HTLV-III antibody has resulted in the promulgation of policies and guidelines for the admission of infected students to public schools. Most of these guidelines have stated that students with AIDS should not be excluded from school unless exceptional circumstances exist. In 1986, two New York local community school boards challenged education and health officials' admission of an unidentified child with AIDS.[95] New York City's AIDS policy provides that children with AIDS will not be automatically excluded from public schools but will be reviewed on a case-by-case basis to determine whether their condition will permit them to attend regular classes. In responding to the challenge to the nonexclusion rule, a state supreme court stated that automatic exclusion of these children would violate the Rehabilitation Act. A handicapped person is defined in the Act as a person with a physical or mental impairment that substantially limits one or more of the major life activities or a person regarded as having such an impairment. The court noted that since a physical disorder includes impairment to the lymphatic system such as caused by HTLV-III, an individual with AIDS has a physical impairment. Additionally, an individual excluded from school because of AIDS would be regarded as having an impairment. Furthermore, the court stated that exclusion of only identified AIDS carriers as proposed by the school boards without excluding children with AIDS-

93. Taylor v. Board of Educ., 649 F. Supp. 1253 (N.D.N.Y. 1986).
94. Gallagher v. Pontiac School Dist., 807 F.2d 75 (6th Cir. 1986).
95. District 27 Community School Bd. v. Board of Educ., 502 N.Y.S.2d 325 (Sup. Ct. 1986).

Related Complex or those infected with the virus would be discriminatory under section 504 and a denial of equal protection of the laws.[96]

The Eighth Circuit Court of Appeals, in a higher education case, held that the disabilities of a doctoral student who was dismissed for academic reasons were not adequate to support a claim under the Rehabilitation Act because she was not "otherwise qualified" for the program.[97] The student identified her handicap as a "test-taking phobia, a neurotic dependency upon her professors and an inability to communicate with her professors due to her right-brain dominance and their left-brain dominance."[98]

In a Seventh Circuit case, a handicapped university student, who had been unsuccessful in an appeal to the United States Department of Education's Office of Civil Rights, sued the Secretary of Education seeking damages and an injunction to compel the Secretary to investigate his complaint.[99] The appellate court acknowledged the private right of action against the recipient of federal funds accused of discrimination[100] but held that there is no provision for an individual to initiate action against an administrative adjudicator.

Employees

The cases reported in this section interpreting the Rehabilitation Act involve public employees in general rather than school personnel. Issues litigated include: What is an impairment under the Act? What constitutes "reasonable accommodation" for an otherwise qualified handicapped person? Does section 504 preclude additional claims under section 1983?

Handicapped Persons. To invoke the protections of the Rehabilitation Act an employee must first establish that he is "handicapped" within the meaning of the Act. The Act defines a handicapped individual as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[101] In reviewing claims, courts first determine if there is an impairment, and then assess whether it substantially limits a major life activity.

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96. New Jersey's AIDS policy was declared void under state law for failure of the commissioner of education to follow provisions of the state administrative procedures law. Board of Educ. v. Cooperman, 507 A.2d 253 (N.J. Super. Ct. App. Div. 1986).
97. Schuler v. University of Minn., 788 F.2d 510 (8th Cir. 1986).
98. *Id.* at 516 n.8.
99. Salvador v. Bennett, 800 F.2d 97 (7th Cir. 1986).
100. *See* Moore v. Warwick Pub. School Dist. No. 29, 794 F.2d 322 (8th Cir. 1986).
101. 29 U.S.C. § 706(7)(B).

The Fifth Circuit Court of Appeals reasoned, in a case involving a letter carrier, that being left-handed was not an impairment, but rather a physical characteristic.[102] It could not be viewed as a chronic illness, a deformity, a mental disability, or a condition affecting the individual's health. In a Fourth Circuit case, the appellate court held that a utility systems repairer's acrophobia did not constitute a handicap.[103] Rather than arguing that the disability substantially limited his major life activities, the employee claimed that his fear of heights had never been a problem in his life or previous jobs.[104] The court concluded that the employer did not perceive the individual's impairment as foreclosing or substantially limiting employability but found him unable to perform the full range of duties required in the position. The court emphasized that an employee who fails to satisfy a specific job demand does not become a handicapped person.

Drug or alcohol abusers whose current use interferes with job performance or poses a threat to property or the safety of others are not handicapped individuals under the Rehabilitation Act. A New York City police officer argued that his dismissal for heroin addiction was impermissible discrimination on the basis of his handicap.[105] The Second Circuit Appellate Court rejected his claim, stating that his drug use rendered him "unfit for police work."[106]

The District of Columbia Federal District Court held that an employee who was not rehired for a position after a reduction in force because he was a transvestite had stated a claim under the Rehabilitation Act.[107] The complaint by the employee, alleging that the employer eliminated a position he sought because officials perceived his transvestism as a handicap, was sufficient to support a claim.

Reasonable Accommodation. A qualified handicapped person is one who can perform the essential functions of a position with "reason-

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102. de la Torres v. Bolger, 781 F.2d 1134 (5th Cir. 1986).

103. Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986).

104. Under a state antidiscrimination statute, a Pennsylvania court held that a personality disorder which caused an employee to be chronically late was not a handicap in that it did not substantially interfere with any major life activities. School Dist. v. Friedman, 507 A.2d 882 (Pa. Commw. Ct. 1986).

105. Heron v. McGuire, 803 F.2d 67 (2d Cir. 1986).

106. While the Ohio Supreme Court found that drug addiction and alcoholism are handicaps under state law, the court also stated that such abuse can be the basis for dismissal if it affects job performance. In the case before the court, an employer was held to have discriminated against an individual who requested a leave of absence for treatment of a chemical dependency; no problems had been noted in the employee's job performance, and the employer had granted disability leave for other employees. Hazlett v. Martin Chevrolet, Inc., 496 N.E.2d 478 (Ohio 1986).

107. Blackwell v. United States Dep't of Treasury, 639 F. Supp. 289 (D.D.C. 1986).

able accommodation." A Pennsylvania federal district court held that the inability of a postal worker to lift heavy objects was a surmountable barrier which could be accommodated.[108] The employee was able to perform many other essential aspects of the position and could perform this function with accommodations, such as the use of equipment.

The question addressed by an Illinois federal district court was whether reasonable accommodation includes reassignment to other positions.[109] According to federal regulations, a qualified handicapped person is one who with reasonable accommodation "can perform the essential functions of the *position in question*."[110] The court interpreted "position in question" to be the position that is denied to a handicapped individual; it does not include other positions the individual could have held.

Other Issues. In a Florida case, the defendants argued that an employee could not bring a handicap discrimination claim under both section 504 and section 1983.[111] Relying on *Smith v. Robinson*, they asserted that the filing of a section 504 suit precluded relief under section 1983 in the same manner as the EHA barred relief under section 504 and section 1983.[112] Rejecting the defendants position, the court concluded that the ruling in *Smith* did not define the relationship between section 504 and section 1983, and further noted that several federal appellate courts had permitted claims under both laws.

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108. Trimble v. Carlin, 633 F. Supp. 367 (E.D. Pa. 1986).
109. Dancy v. Kline, 639 F. Supp. 1076 (N.D. Ill. 1986).
110. *Id.* at 1078, *citing* 29 C.F.R. § 1613.702(f).
111. Shuttleworth v. Broward County, 639 F. Supp. 654 (S.D. Fla. 1986).
112. 468 U.S. 992 (1984).